

**STATE BAR COURT OF CALIFORNIA  
HEARING DEPARTMENT - SAN FRANCISCO**

|                                   |   |                                 |
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| In the Matter of                  | ) | <b>Case No. 06-PM-14343-PEM</b> |
|                                   | ) |                                 |
| <b>THOMAS LEIGH UPHOLT,</b>       | ) | <b>ORDER GRANTING MOTION TO</b> |
|                                   | ) | <b>REVOKE PROBATION AND FOR</b> |
| <b>Member No. 67868,</b>          | ) | <b>INVOLUNTARY INACTIVE</b>     |
|                                   | ) | <b>ENROLLMENT</b>               |
| <u>A Member of the State Bar.</u> | ) |                                 |

**I. Introduction**

In this probation revocation proceeding, respondent **Thomas Leigh Upholt** is charged with violating his probation conditions imposed by the California Supreme Court. The Office of Probation of the State Bar of California (Office of Probation) seeks to revoke his probation, to impose upon respondent the entire period of suspension previously stayed, and to involuntarily enroll respondent as an inactive member of the State Bar.

The court finds, by preponderance of the evidence, that respondent has violated his probation conditions and hereby grants the motion. The court recommends, among other things, that respondent's probation be revoked, that the previous stay of execution of the one-year suspension be lifted, and that respondent be actually suspended from the practice of law for one year.

**II. Pertinent Procedural History**

On September 21, 2006, the Office of Probation properly served a motion to revoke probation on respondent, under rules 60 and 563(a) of the Rules of Procedure of the State Bar of California.<sup>1</sup> The motion was mailed to respondent's official membership records address

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<sup>1</sup>References to rules are to the Rules of Procedure of the State Bar.

(official address). The motion was filed on September 22, 2006. Respondent did not file a response within 20 days of the service of motion, as required by rule 563(b)(1).

The court took this matter under submission on November 6, 2006.

### **III. Findings of Fact and Conclusions of Law**

All factual allegations contained in the motion to revoke probation and supporting documents are deemed admitted upon respondent's failure to file a response. (Rules Proc. of State Bar, rule 563(b)(3).)

#### **A. Jurisdiction**

Respondent was admitted to the practice of law in California on December 15, 1975, and has since been a member of the State Bar of California.

#### **B. Probation Conditions in Supreme Court Case No. S138823**

On January 20, 2006, in Supreme Court case No. S138823 (SCO), the California Supreme Court ordered that:

1. Respondent be suspended from the practice of law for one year, that execution of the suspension be stayed;
2. Respondent be placed on probation for two years, as recommended by the Hearing Department of the State Bar Court in its order approving stipulation filed on September 28, 2005 (State Bar Court case No. 03-O-04884; 04-O-10445; 04-O-11582 (Cons.));
3. Respondent comply with certain probation conditions, including, but not limited to:
  - a. Contacting the Office of Probation within 30 days of the effective date of discipline and scheduling a meeting with his assigned probation deputy to discuss the terms and conditions of respondent's probation; and
  - b. Submitting quarterly reports to the Office of Probation on each January 10, April 10, July 10, and October 10 of the probationary period.

Notice of the SCO was properly served upon respondent in the manner prescribed by rule 24(a) of the California Rules of Court at respondent's official address in accordance with

Business and Professions Code section 6002.1.<sup>2</sup>

**C. Probation Violations**

On January 30, 2006, the Office of Probation sent a letter to respondent, at his official address, reminding him of his probation conditions, including the requirement that he schedule a meeting within 30 days of the effective date of discipline with his assigned probation deputy.

On May 9, 2006, the Office of Probation deputy, who was assigned to maintain and monitor respondent's file, telephoned respondent at his membership records telephone number. No one answered the phone. However, the probation deputy left a voice mail message stating that respondent should submit his quarterly report that had become due on April 10, 2006, as soon as possible. The probation deputy also left her name and telephone number so that respondent could contact her, if he had any questions.

On May 17, 2006, the Office of Probation twice tried to telephone respondent at his official membership records telephone number, but received a busy signal and was, therefore, unable to leave a message. Additionally, on that same date, the Office of Probation sent a letter to respondent and advised him that it had not received his first quarterly report that had become due on April 10, 2006.

The January 30 and May 17, 2006 letters were not returned as undeliverable.

On September 11 and September 12, 2006, the Office of Probation tried to telephone respondent at his membership records telephone number. However, as no one answered the phone calls made on September 11 and September 12, the probation deputy, who made those phone calls, left a voice mail message on each day, stating that respondent should submit his quarterly reports that had become due on April 10 and July 10, 2006, as soon as possible. The probation deputy left her name and telephone number for respondent with each voice mail message, so that respondent could contact her if he had any questions.

Based on the evidence submitted by the Office of Probation, respondent failed to do the following:

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<sup>2</sup>References to sections are to the Business and Professions Code.

1. Contact the Office of Probation within 30 days of the effective date of discipline and schedule a meeting with his assigned probation deputy to discuss the terms and conditions of respondent's probation; and
2. Submit the quarterly reports due on April 10 and July 10, 2006.

Bad faith is not a requirement for a finding of culpability in a probation violation matter; "instead, a 'general purpose or willingness' to commit an act or permit an omission is sufficient." (*In the Matter of Potack* (Review Dept. 1991) 1 Cal. State Bar Ct. Rptr. 525, 536.)

Section 6093, subdivision (b), provides that violation of a probation condition constitutes cause for revocation of any probation then pending, and may constitute cause for discipline. Section 6093, subdivision (c), provides that the standard of proof is the preponderance of the evidence.

Therefore, the State Bar has demonstrated by a preponderance of the evidence that respondent wilfully violated the probation conditions ordered by the Supreme Court in its January 20, 2006 order. Respondent failed to contact the Office of Probation within 30 days of the effective date of discipline and schedule a meeting with his assigned probation deputy to discuss the terms and conditions of his probation; respondent also failed to submit to the Office of Probation the quarterly reports that were due on April 10 and July 10, 2006.

As a result, the revocation of respondent's probation in California Supreme Court case No. S138823 is warranted.

#### **IV. Mitigating and Aggravating Circumstances**

##### **A. Mitigation**

Since respondent did not file a response to the probation revocation motion, no evidence in mitigation was presented and none is apparent from the record. (Rules Proc. of State Bar, tit. IV, Stds. for Attorney Sanctions for Prof. Misconduct, std. 1.2(e).)<sup>3</sup>

##### **B. Aggravation**

There are several aggravating factors. (Std. 1.2(b).)

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<sup>3</sup>All further references to standards are to this source.

Respondent has a prior record of discipline. (Std. 1.2(b)(i).) On September 28, 2005, in the underlying matter, respondent, upon stipulation, was ordered suspended for one year, stayed, and placed on probation for two years for failing in one client matter to provide competent legal services, improperly withdrawing from employment, and failing to cooperate with a State Bar disciplinary investigation; for engaging in the unauthorized practice of law in two additional client matters, resulting in violations of section 6068, subdivision (a) and; for failing to notify the membership records department of the State Bar of his change of address within 30 days of the change, resulting in a violation of section 6068, subdivision (j).

Respondent committed multiple acts of wrongdoing, including failing to submit reports due on April 10 and July 10, 2006, and failing to contact the Office of Probation within 30 days of the effective date of discipline and to schedule a meeting with his assigned probation deputy. (Std. 1.2(b)(ii).)

Respondent's failure to participate in this proceeding is also an aggravating factor. (Std. 1.2(b)(vi).)

## **V. Discussion**

Public protection and attorney rehabilitation are the primary goals of disciplinary probation. (*In the Matter of Howard* (Review Dept. 1993) 2 Cal. State Bar Ct. Rptr. 445, 452.)

“[T]here has been a wide range of discipline imposed for probation violations from merely extending probation. . .to a revocation of the full amount of the stayed suspension and imposition of the amount as an actual suspension.” (*In the Matter of Gorman* (Review Dept. 2003) 4 Cal. State Bar Ct. Rptr. 567, 573.)

In determining the level of discipline to be imposed, the court must consider the “total length of stayed suspension which could be imposed as an actual suspension and the total amount of actual suspension earlier imposed as a condition of the discipline at the time probation was granted.” (*In the Matter of Potack* (Review Dept. 1991) 1 Cal. State Bar Ct. Rptr. 525, 540.) The extent of the discipline to be recommended is dependent, in part, on the nature of the probation violation and its relationship to respondent's prior misconduct. (*Ibid.*)

Here, respondent's prior misconduct included his failure to support and uphold the law by

practicing law when he was not entitled to do so. In the instant matter, the primary probation violation found was his failure to comply with the rehabilitation conditions. Respondent failed to file several quarterly reports. Respondent also failed to contact the Office of Probation and schedule a meeting with his assigned probation deputy to discuss the conditions of his probation.

“[A] probation ‘reporting requirement permits the State Bar to monitor [an attorney probationer’s ] compliance with professional standards.’” (*In the Matter of Weiner* (Review Dept. 1997) 3 Cal. State Bar Ct. Rptr. 759, 763, citing *Ritter v. State Bar* (1985) 40 Cal.3d 595, 605.) In addition, “an attorney probationer’s filing of quarterly probation reports is an important step towards the attorney’s rehabilitation.” ((*In the Matter of Weiner* , *supra*, 3 Cal. State Bar Ct. Rptr. at p. 763.) Thus, respondent’s failure to contact the Office of Probation and his failure to file quarterly reports warrants significant discipline.

In consideration of respondent’s violation of probation conditions and his lack of participation in these proceedings and continuing noncompliance with probation conditions despite the Office of Probation’s efforts to secure it, the court does not believe it worthwhile to recommend again placing him on probation subject to conditions.

The prior disciplinary order “provided [respondent] an opportunity to reform his conduct to the ethical strictures of the profession. His culpability in [the matter] presently under consideration sadly indicates either his unwillingness or inability to do so.” (*Arden v. State Bar* (1987) 43 Cal.3d 713, 728.)

Hence the court finds good cause to GRANT the motion to revoke respondent’s probation and recommends that the entire period of his stayed suspension be imposed.

## **VI. Recommended Discipline**

Accordingly, the court recommends as follows:

1. That the probation of respondent **Thomas Leigh Upholt** previously ordered in Supreme Court case No. S138823 (State Bar Court case No. 03-O-04884; 04-O-10445; 04-O-11582 (Cons.)) be revoked;
2. That the previous stay of execution be lifted; and
3. That respondent be actually suspended from the practice of law for one year.

It is also recommended that the Supreme Court order respondent to comply with rule 955, paragraphs (a) and (c), of the California Rules of Court,<sup>4</sup> within 30 and 40 days, respectively, of the effective date of its order imposing discipline in this matter.

It is not recommended that respondent be ordered to take and pass the Multistate Professional Responsibility Examination as he was previously ordered to do so in S138823.

### **VII. Costs**

The court recommends that costs be awarded to the State Bar in accordance with Business and Professions Code section 6086.10 and are enforceable both as provided in Business and Professions Code section 6140.7 and as a money judgment.

### **VIII. Order of Involuntary Inactive Enrollment**

Respondent is ordered to be involuntarily enrolled inactive under Business and Professions Code section 6007, subdivision (d)(1).<sup>5</sup> The inactive enrollment order will be effective three calendar days after the date upon which this Order is served.

Dated: December \_\_, 2006

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PAT McELROY  
Judge of the State Bar Court

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<sup>4</sup>Rule 955 of the California Rules of Court is renumbered to rule 9.20, effective January 1, 2007.

<sup>5</sup>Any period of involuntary inactive enrollment will be credited against the period of actual suspension ordered. (Bus. & Prof. Code, § 6007, subd. (d)(3).)